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In the Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
NATIONAL TREASURY EMPLOYEES UNION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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1. A unanimous panel of the United States Court of Appeals for the Ninth Circuit enforced an order of the Federal Labor Relations Authority ("Authority" or "FLRA") finding that the Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California ("ATF") had committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the "Labor-Management Statute"), 5 U.S.C. (Supp. V) 7101 *et seq.*[1] (Petit. App. A, 1a-11a and Petit. App. B,

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[1] 5 U.S.C. (Supp. V) 7116(a)(1) and (8) provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

12a-13a). The basis for the Authority ruling was that ATF had failed and refused to comply with 5 U.S.C. (Supp. V) 7131(a)[2] by denying Donald Pruett, an ATF employee who represented the National Treasury Employees Union, Chapter 81 (the "union"), official (i.e., paid) time and necessary travel and per diem during union-agency negotiations on the impact and implementation of ATF's decision to move its Lodi, California, area office to Sacramento, and to establish a reduced duty post in Lodi (Petit. App. D, 20a-34a). The Authority ordered ATF to cease and desist from such practices and to take appropriate affirmative action (*id.* at 16a-17a).

2. The Authority's order adopted a decision and order of an Administrative Law Judge (Petit. App. D, 15a-17a) and was based upon an earlier Interpretation and Guidance issued by the Authority (2 F.L.R.A. No. 31; Petit. App. E, 35a-47a). In its Interpretation, the Authority concluded, as relevant to this petition, that employees on official time under 5 U.S.C. (Supp. V) 7131(a) while representing a union in negotiating a collective bargaining agreement with an agency are entitled to payment from that agency for their travel expenses and per diem.[3]

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[2] 5 U.S.C. (Supp. V) 7131(a) provides:

§ *7131. Official time*

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

[3] The Authority in its Interpretation also concluded that the official time provision of 5 U.S.C. (Supp. V) 7131(a) applies to the negotiation of any collective bargaining agreement between the parties (including mid-term negotiations), not merely negotiations of a "basic" agreement. The court of appeals also af-

In support of its conclusion, the Authority specifically noted Congress' express rejection of attempts to incorporate the restrictive official time policies of Executive Order 11491, as amended, *reprinted in* 5 U.S.C. (Supp. V) 7101 note at 312, under which payment of travel expenses and per diem was not authorized, into the Labor-Management Statute (Petit. App. E, 42a n.6). In this regard, the Authority pointed out that the official time provisions under 5 U.S.C. (Supp. V) 7131(a) are completely different from those of the rejected Senate bill, which sought to maintain the language of the official time provisions under the Executive Order. Thus, unlike under the Executive Order which strictly limited the amount of official time which might be authorized for negotiation activities by employee union representatives, section 7131(a) contains no such limitation. As explained by the House Report, such employee is on "paid time" and entitled to his or her usual compensation. H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978) (*id*). The Authority further explained that unlike under the Executive Order, the encouragement of collective bargaining is a stated purpose of the Labor-Management Statute (*id.* at 42a).

Additionally, the Authority emphasized that, under the Labor-Management Statute, employees participating in negotiation activities pursuant to 5 U.S.C. (Supp. V) 7131(a) are engaged on official government business and are therefore authorized payment of travel and per diem expenses, under 5 U.S.C. (Supp. V) 5701 *et seq.* (*id.* at 43a). The Authority concluded that its determination that such employees are engaged on "official business for the Government" is compelled because of Congress' specific finding that collective bargaining is in the public interest and contributes to the effective

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firmed this conclusion of the Authority. This aspect of the court's decision is not challenged in ATF's petition for a writ of certiorari (Pet. 9 n.7).

conduct of public business, and from the statutory requirement that parties conduct their negotiations in good faith, including meeting at reasonable times and convenient places as frequently as may be necessary. *See* 5 U.S.C. (Supp. V) 7101(a), 7114, 7116(a)(5) and (b)(5) (*id.*).

Moreover, as explained by the Authority, the payment of travel expenses and per diem also implements Congress' intent more nearly to equate the status of union and management negotiators. Reducing this inequality facilitates more effective union representation at the bargaining table, which in turn encourages collective bargaining and contributes to the effective conduct of public business. 5 U.S.C. (Supp. V) 7101(a). In this connection, the Authority stated that agencies uniformly pay travel expenses and per diem for management negotiators, and Congress indicated in the legislative history that similar prerogatives are to be accorded employees serving as union negotiators under 5 U.S.C. (Supp. V) 7131(a) (*id.* at 43a-44a).[4]

Finally, as the Authority pointed out, it had previously interpreted language in section 7131(c), identical to the pertinent language in 7131(a), as entitling employees on official time in Authority proceedings to travel and per diem expenses. Section 2429.13 of the Authority's regulations, 5 C.F.R. 2429.13 (1982). The Authority stated that no persuasive reason had been

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[4] The Authority quoted the following statement of Congressman Clay (124 Cong. Rec. 29188 (1978)):

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization.... Activities that involve labor-management contacts are not included in this section.... Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities. (Emphasis in Interpretation.)

advanced for a contrary interpretation of the analogous language in 7131(a), and no supported challenge had been advanced regarding the legality of the Authority's prior interpretation of the same critical language in 7131(c) (*id.* at 44a-45a).

For these reasons, the Authority determined in its Interpretation that employees on official time under section 7131a while representing an exclusive representative in collective bargaining agreement negotiations are entitled to payments from their agencies for travel and per diem expenses.

3. The court of appeals affirmed, concluding (Petit. App. A, 11a):

> The FLRA's Interpretation and Guidance is reasoned and supportable, and therefore will be given deference by this Court. The FLRA, acting in its own area of expertise, has interpreted the relevant language of Title VIII [the Labor-Management Statute] in a clearly defensible manner, and we are neither permitted not inclined to substitute a different judgment.

Moreover, the panel unanimously denied petitioner's petition for rehearing and rejected the suggestion of a rehearing in banc. In addition, no judge of the full court requested a vote on the suggestion for rehearing in banc (Petit. App. C, 14a).

4. The court of appeals applied the correct standard of review to the Authority's Interpretation regarding the payment of travel expenses and per diem under 5 U.S.C. (Supp. V) 7131(a). In this regard, the court recognized that the Authority acted well within its own area of expertise in determining that Congress intended employee union negotiators to be engaged on official government business while on official time under 5 U.S.C. (Supp. V) 7131(a). As the court stated: "The FLRA's determination that union negotiators are entitled to travel expenses and a per diem is based largely on its finding that section 7131(a) authorized official

time" for collective bargaining negotiations (Petit. App. A, 9a). Moreover, the court's discussion (*id.* at 9a-10a) makes it clear that the Authority's ruling, that employees serving as labor representatives in collective bargaining negotiations are on official government business, is based on the Authority's analysis of the Labor-Management Statute and its legislative history and purpose.

Further, with respect to the standard of review, the court correctly held that:

> Review of a decision of the FLRA shall be on the record in accordance with 5 U.S.C. § 706, *see* 5 U.S.C. § 7123(c), and the agency's action shall be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *Id.* § 706(2)(A). In the case at bar, if the FLRA's Interpretation and Guidance is found to be a reasonable interpretation of the law, the FLRA decision is clearly not arbitrary and capricious.

(*Id.* at 4a). The court further stated that the weight given such an Interpretation on judicial review will depend on "the thoroughness evident in [its] consideration, the validity of the reasoning, and [its] consistency with earlier and later pronouncements. *Skidmore v. Swift & Co.*, 323 U.S. 124, 140 (1944)." (Petit. App. A, 4a-5a.) Indeed, the court specifically recognized the principle asserted by petitioner (Pet. 18a); namely that "an agency should not be permitted to usurp congressional authority to make major policy decisions. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)." (Petit. App. A, 5a.)

After setting forth in detail the applicable standard of review and the limitation on the policy of deference to an agency's ruling, the court proceeded to analyze the relevant language, legislative history, and purpose of the Labor-Management Statute and thereupon properly determined that the Authority's Interpretation is

reasoned and supportable and should be enforced (*id.* at 5a-11a).

In reaching its conclusion, the court took cognizance of a point specifically acknowledged by the Authority—namely, that "neither the statutory language nor the legislative history expressly refers to this question [of travel and per diem expenses]" (*id.* at 9a). The court then proceeded to set forth several factors relating to the objective of the Labor-Management Statute that, according to the court, "nevertheless appear to indicate that these expenses are authorized" (*Id.*).

Among other factors, the panel discussed section 7101(a)(1)(B) of the Labor-Management Statute, "in which Congress stated that collective bargaining in the civil service contributes to the effective conduct of public business. Thus, it appears that labor representatives should be treated similarly to other government employees conducting business for the government" (*id.*). Further, the panel approved "the FLRA's effort to equalize the positions of the parties to collective bargaining negotiations" as consistent with congressional intent in enacting the Labor-Management Statute (*id.* at 10a). Thus, upon consideration of the congressional purpose of the Labor-Management Statute and the Authority's role "to provide leadership in establishing policies and guidelines and to take responsibility for carrying out the purpose" of the Labor-Management Statute (5 U.S.C. (Supp. V) 7105(a)(1)) [*id.* at 4a], the court properly affirmed the Authority's decision and granted enforcement of its order.

5. The Authority believes that the decision of the court below is correct. The Authority recognizes, however, that the decision conflicts with recent decisions of the Second and Eighth Circuits. *See Division of Military & Naval Affairs v. FLRA*, 683 F.2d 45, *rehearing denied* (2d Cir. Sept. 17, 1982); *Department of Agriculture v. FLRA*, No. 81-1948 (Aug. 9, 1982), *rehearing*

denied (8th Cir. Sept. 14, 1982).[5] The issue is an important and recurrent one. Indeed, other cases are pending in the Eleventh and District of Columbia Circuits. *See, e.g., Florida National Guard v. FLRA*, No. 81-5466 (11th Cir. argued Sept. 1, 1982); *Bureau of the Mint and United States Customs Service v. FLRA*, Nos. 82-1194, 82-1195 (D.C. Cir. filed Feb. 24, 1982). It is necessary, therefore, that the existing uncertainty as to the statutory entitlement, under 5 U.S.C. (Supp. V) 7131(a), of employee union representatives in these circumstances to travel expenses and per diem from their employing agencies be eliminated, and that the conflict among the courts of appeals be resolved as soon as possible.

Accordingly, the Authority does not oppose granting the present petition.[6]

Respectfully submitted,

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DECEMBER 1982

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[5] In both these cases, the petition for review was granted and enforcement of the Authority's order denied in 2-1 decisions, with separate dissenting opinions.

[6] The Solicitor General has authorized the filing of this memorandum.